Supreme Court, U. S.
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80-1100

NO.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

MARRIOTT CORPORATION, et al.,

Petitioners,

vs.

BETHLEHEM STEEL CORPORATION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether admiralty law of the United States with respect to maritime torts as enunciated by decisions of this Court establishes an "overriding domestic policy translated into law," Black Diamond S.S. Corp. v. Robert Stewart & Sons (Norwalk Victory), 336 U.S. 386 (1949), by reason of which vessels detained due to admittedly negligent obstruction of a foreign navigable channel are entitled to recovery of economic losses consisting of liquidated damages.

2. Whether, in light of the conflicting decisions of the Court of Appeals for the Second Circuit in Federal Commerce & Nav. Co., v. The M/V Marathonian, 528 F.2d 907 (2d Cir. 1975), cert. denied, 425 U.S. 975 (1976), and the Court of Appeals for

the Fourth Circuit in Venore Transp. Co. v. M/V Struma, 583 F.2d 708 (4th Cir. 1978), this Court should review and clarify its decision rendered 53 years ago in Robins Dry Dock & Repair Co. v. Flint, 275 U.S. 303 (1927).

LIST OF PARTIES

Marriott Corporation, through its division, Sunline Agencies, and Oceanic Sunline Special Shipping Company

Weyerhaeuser Company, through its division, Weyerhaeuser Line

A/S Rederiet Odfjell

Polski Linie Ocaniczne

Naviera Alcala, S.A.

Matthew Shipping Company Limited and Matthew Ship Chartering Limited

I. S. Joseph Shipping Co., Ltd.

Manchester Liners, Inc.

Naviera Ceresio S.A.

Scindia Steam Navigation, Ltd.

Federal Commerce and Navigation [1974] [Ltd.]

Skips A/S Westray

Hyman-Michaels Company

Jadranska Slobodna Plovidba

Ocean Transport, Inc.

Kommanditgesellschaft Great Lakes Transcaribbean Line G.M.B.H. and Co.

Richmond Shipping Limited and Cast Shipping Limited

Luria Brothers & Company, Inc.

Murmansk Shipping Company

Black Sea Shipping Company

Kurt Orban Company, Inc.

Parcel Tankers, Inc.

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Petitioners, Marriott Corporation, et al., respectfully pray that a writ of certiorari issue to review the portion of the judgment and opinion of the United States Court of Appeals for the Sixth Circuit relating to the appeal of such Petitioners in that Court.

OPINIONS BELOW

Memorandum and Order of the District Court entered October 20, 1977 is published at 449 F.Supp. 681 (1977) (Appendix B). The opinion of the Court of Appeals decided and filed October 2, 1980 (Appendix A) has not been reported.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was decided and entered on October 2, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT OF THE CASE

This case involves damages to Petitioners resulting from an accident in the Welland Canal caused by Respondent's vessel during 1974. The steamer Steelton struck a bridge and obstructed the canal for approximately two weeks thus detain-

ing Petitioners' vessels.

In denying recovery of detention damages of $1,433,791.11 sustained by thirty six vessels against an admitted tort-feasor, and concluding that the domestic policy of the United States does not permit recovery of economic loss in the absence of physical injury, the Sixth Circuit has ignored well established law of maritime torts as clarified by recent decisions of this Court specifically holding that there may be such recovery of economic loss in maritime claims. Moragne v. States Marine Lines, 398 U.S. 375 (1970); Sea-Land Services, Inc. v. Gaudet, Adm'rx., 414 U.S. 573 (1974); American Export Lines, Inc. v. Alvez, 100 S.Ct. 1673 (1980). Thus, the Sixth Circuit has decided an important question of federal maritime law which has not been, but should be, settled by

this Court.

Moreover, the Sixth Circuit ignored its own decision specifically allowing the right to recovery of purely economic loss. National Steel Corp. v. Great Lakes Towing Co., 574 F.2d 339 (6th Cir. 1978).

The Sixth Circuit further refused to consider or even comment upon the issue raised in conflicting decisions of the Second and Fourth Circuits with respect to rights regarding vessel owners and charterers to recover such losses. Federal Commerce & Nav. Co. v. The M/V Marathonian, 528 F.2d 907 (2d Cir. 1975), cert. denied, 425 U.S. 975 (1976); Venore Transp. Co. v. M/V Struma, 583 F.2d 708 (4th Cir. 1978). As stated by the Second Circuit,

> "the Supreme Court should retain the exclusive privilege of overruling its own decisions,

> save perhaps when opinions already delivered have created a near certainty that only the occasion is needed for pronouncement of the doom." 528 F.2d at 908.

Such certainty was created by the Fourth Circuit's holding that either the owner or the charterer, but not both, may recover.

This case provides the occasion for pronouncement of the doom.

Facts of the Case

On August 25, 1974, the steamer Steelton, owned and operated by Bethlehem Steel Corporation, en route from Lake Erie to Lake Ontario, collided with a highway bridge which spanned the Welland Canal. The Welland Canal lies wholly within the territorial boundaries of Canada and is the only means of passage between the two lakes. The bridge, owned by the St. Lawrence Seaway Authority, was

extensively damaged and the canal was completely blocked for approximately two weeks. Petitioners are owners and/or charterers of vessels which were detained by reason of the obstruction of the Welland Canal. The conduct of the Steelton's navigation is admitted by Bethlehem to have been negligent.

Shortly after the collision, Bethlehem filed an action in the Federal Court of Canada for limitation of liability under Canadian law and the Canadian court subsequently entered an order limiting Bethlehem's liability.

Separate actions were commenced against Bethlehem in the District Court for the Northern District of Ohio whereupon Bethlehem filed a complaint in the Northern District of Ohio admitting fault as to the conduct of the navigation of the Steelton, a vessel registered

and documented under United States law, and seeking limitation of its liability pursuant to Title 46 U.S.C. §§183-185 and Supplemental Rule (F) for certain admiralty and maritime claims of the Federal Rules of Civil Procedure.

In due course, all Petitioners filed claims in the limitation proceedings contesting Bethlehem's right to limit the amount of its liability pursuant to said statutes and rule. The total claims filed in the two actions were far in excess of the amount available for their satisfaction under the limitation provisions of either Canadian or American law.

During the pendency of the action in the Northern District of Ohio, the Canadian trial court entered a judgment dismissing all detention claims filed in that court. The judge of the Canadian

court held that, under Canadian law, where a claim is only for economic loss with no actual physical injury to the claimant, damages generally are not recoverable even where the prerequisites of foreseeability and a causal relationship are met. Concluding that the ruling of the Canadian court stated the controlling law of Canada, the District Court held there could be no recovery for economic loss resulting from detention of the vessels under the doctrine of lex loci delicti commissi and summarily dismissed all of Petitioners' claims.

Proceedings Below

On appeal to the Sixth Circuit, Petitioners raised two major questions now being presented to this Court by this Petition For Writ of Certiorari. Both directly involve prior decisions of this Court.

In Black Diamond S.S. Corp. v. Robert Stewart & Sons (Norwalk Victory), 336 U.S. 386 (1949), this Court set forth the generally accepted principle of application of lex loci delicti commissi with the specific qualification that the doctrine should be considered only "in the absence of some overriding domestic policy translated into law." Petitioners contended that the exception thereby carved out by this Court in Norwalk Victory was particularly applicable and that it was just the type of inequity produced by the decision of the Canadian court which prompted this Court in Norwalk Victory to qualify application of the doctrine where an overriding domestic policy translated into law existed.

Even though the Sixth Circuit acknowledged that there is no absolute

rule in the United States which forbids recovery of economic loss where the claimant has suffered no physical injury, that court concluded there is no over-riding domestic policy translated into law. That conclusion completely ignores recent decisions rendered by this Court establishing such a domestic policy.

The second question raised involves this Court's decision rendered some 53 years ago in Robins Dry Dock & Repair Co. v. Flint, 275 U.S. 303 (1927), holding in essence that a vessel owner is entitled to recovery of loss of use when detained by negligence but that the right to such recovery does not extend to a vessel charterer even though the charterer may have been required to pay charter hire to the owner during the detention period. In the light of modern maritime commerce and the almost

universal use of various types of charters in the operation of vessels in every aspect of the maritime community, recent decisions have questioned application of the rule enunciated in Robins Dry Dock & Repair Co. v. Flint, supra. In Federal Commerce & Nav. Co. v. The M/V Marathonian, supra, the Court of Appeals for the Second Circuit challenged the wisdom of the rule in today's commercial atmosphere but stated that it was up to this Court to determine whether the rule should be changed. More recently, the Fourth Circuit in Venore Transp. Co. v. M/V Struma, supra, concluded that the Robins rule was not applicable if the charterer was obligated to continue payment of charter hire to the owner and recovery by the charterer constituted the same loss which would have been recovered by the

vessel owner but for the existence of the charter. Even though the Sixth Circuit was requested to render a decision with respect to the Robins ruling since many of the Petitioners' claims are on behalf of charterers, the Sixth Circuit completely ignored the issue in its opinion.

REASONS FOR GRANTING THE WRIT

Preliminary Statement

Both questions raised by the Petition directly involve clarification of this Court's earlier decisions rendered 31 and 53 years ago. This Court is requested to review and interpret those two decisions in the light of its own pronouncements relating to modern legal and social philosophies as applied to the responsibilities of a maritime tort-feasor for the direct consequences of its acknowledged fault.

In each instance the issues are far-reaching in that they have a direct and immediate bearing on all maritime commerce conducted under the protection, guidance and dictates of the laws of the United States as pronounced and interpreted by this Court.

This Court long has been the guardian of federal questions raised under the General Admiralty and Maritime Law and very recently has rendered several decisions, each bearing upon Petitioners' rights to recover damages sustained by reason of Respondent's negligence. In the latest of those decisions, American Export Lines, Inc. v. Alvez, supra, it was observed that principles of maritime law prevalent as late as 1963 militated against, rather than supported, the issue of purely economic loss involved in that decision.

The two cases which this Court now is asked to review under modern law preceded that date by many years.

Furthermore, this writ should be granted because the questions raised fall specifically within the provisions of Rule 17 of the Rules of this Court setting forth Considerations Governing Review on Certiorari. With respect to the first question, the Court of Appeals for the Sixth Circuit has decided an important question of federal law which has not been, but should be, settled by this Court, and has decided that question in a way in conflict with applicable decisions of this Court. As to the second question, the Sixth Circuit ignored decisions of the Second and Fourth Circuits which are in conflict with each other on the same matter.

Clearly, there are special and important reasons for granting this writ.

Question 1.

When the District Court summarily dismissed Petitioners' claims on the basis of the decision of the Canadian Federal Court relying solely on the doctrine lex loci delicti commissi, that court brought into focus the significance, intent and meaning of the limitation imposed by this Court that the doctrine should be applied only "in the absence of some overriding domestic policy translated into law." Clearly this Court intended to qualify application of that doctrine and recognized that exceptions existed which would warrant refusal to apply the law of the place of the occurrence under pertinent and proper circumstances.

Petitioners now request this Court to express its views on the meaning of that specific limitation as applied to its recent pronouncements with respect to recovery of economic losses in maritime torts under circumstances where no physical injury was sustained by the party entitled to recovery.

Supreme Court Decisions

In 1970, Moragne v. States Marine Lines, supra, set the stage by allowing recovery under the general maritime law by a widow for her economic loss sustained as a consequence of the death of her husband.

Four years later in Sea-Land Services, Inc. v. Gaudet, Adm'rx., supra, this Court expanded upon the Moragne decision by granting a maritime right of recovery of economic losses to a decedent's family for their loss of support, services and society, expanding upon the term

"society" as embracing

> "a broad range of mutual benefits each family member receives from the others' continued existence, including love, affection, care, attention, companionship, comfort, and protection." 414 U.S. at 585.

Most recently, in American Export Lines v. Alvez, supra, decided May 12, 1980, this Court extended those rights to apply to economic losses measuring a widow's loss of consortium. The principle to be followed in determining the right to recover economic loss was stated by this Court on p. 1677 as follows:

> "But it is a settled canon of maritime jurisprudence that 'it better becomes the humane and liberal character of proceedings in admiralty to give than to withhold the remedy, when not required to withhold it by established and inflexible rules.'"

As noted earlier, the Sixth Circuit stated specifically on p. 13 of its opinion (Appendix A) that there is no

absolute rule in the United States which forbids recovery for economic loss where the claimant has suffered no physical injury.

The decision of this Court in Lauritzen v. Larsen, 345 U.S. 571 (1953) has a most significant bearing on the issue now presented in that this Court considered at length the several factors with respect to choice of law governing a maritime tort claim, stating on p. 584 that:

> "Perhaps the most venerable and universal rule of maritime law relevant to our problem is that which gives cardinal importance to the law of the flag."

Other Authorities

An erroneous conclusion upon which the Sixth Circuit in part based its decision is the assertion contained on p. 14 of the opinion (Appendix A) that the duty owed to Petitioners is the same

as that owed to the public in general. Such simply is not the case. In the course of maritime commerce generally, vessels are restricted in their navigation to channels and an unlawful obstruction created negligently, directly and foreseeably affects all navigation in that channel different than it does the public at large. Specifically in this case, Petitioners' vessels were foreclosed from proceeding in any alternative manner whereas members of the public who relied upon use of the bridge for whatever reason were afforded the opportunity of adopting alternative measures during the period the canal was obstructed. Three decisions of other courts clearly establish a right to recovery of loss of use under such circumstances. They are: Gartland S.S. Co. v. Elgin, Joliet

and Eastern Ry. Co., 277 F.2d 382 (7th Cir. 1960); In Re Lyra Shipping Co., 360 F.Supp. 1188, (E.D. La. 1973); In Re China Union Lines, Ltd., 285 F.Supp. 426 (S.D. Tex. 1967).

Arguments with respect to remoteness and foreseeability were relied upon in both the District Court and the Sixth Circuit. Those arguments clearly are inapplicable not only as shown by the above cases but also by the decision of the Court of Appeals for the Ninth Circuit in Union Oil Co. v. Oppen, 501 F.2d 558 (9th Cir. 1974), where recovery of economic loss was awarded to commercial fishermen based upon negligent interference of their rights to earn a living due to an oil spill, holding that the loss of a prospective economic advantage presented a sufficient basis for recovery under the

law of negligence. That court noted on p. 561 that "an injury to maritime vessels and an interference with their right of navigation...constituted a maritime tort cognizable in admiralty."

The Sixth Circuit in its own decision in National Steel Corp. v. Great Lakes Towing Co., supra, allowed recovery of economic losses to a steel plant deprived of the use of its plant as a result of defendants' negligently damaging a railroad bridge used by the steel plant in the conduct of its business. Certainly on the subject of remoteness, recovery of that loss is at least one step removed from loss directly sustained by Petitioners herein. As previously stated, the opinion of the Sixth Circuit in this case ignored its own National Steel decision

rendered only two years ago.

To foreclose the issue of remoteness and foreseeability completely in the present case, reference need only be made to the Sixth Circuit's language on p. 4 of its opinion (Appendix A) that the Canadian court denied recovery "even where the injury might have been foreseeable and a proper causal relationship between the act and injury exist," a specific finding by the Canadian court in its opinion as to this case.

Finally, in response to any argument which may be made that the recent decisions of this Court apply only to personal injuries as distinguished from physical injuries in general, the observations of Gilmore and Black in their treatise The Law of Admiralty (2d ed. 1975) at p. 29 are most apropos:

"if there is any sense at all in having a separate basis for admiralty jurisdiction in the federal courts, it must be because there is a federal interest that can best be implemented by thus dealing with the major concerns of the shipping industry - with all of them, and not just with a few of them selected on antiquarian criteria."

Question 2.

It should be noted at the outset that in this instance some of Petitioners are vessel owners but the greater number are charterers. Thus the rights of all of Petitioners are involved in the first question whereas only those of vessel charterers are concerned in the issue raised with respect to this question relating to Robins Dry Dock & Repair Co. v. Flint, supra.

Over the years, courts and legal scholars have questioned the wisdom of

extending the ruling of this Court in Robins to circumstances beyond the specific facts of the case. That case involved a breach of contract claim by a vessel charterer against a drydock company. Briefly, recovery of loss of use sustained by the vessel by reason of drydock delay due to breach of contract was denied primarily on the theory that the contract between the vessel owner and the drydock was not for the charterer's benefit. The rationale of that decision has been extended by lower courts to include all claims by charterers for loss of charter hire whether based upon contract or tort.

This action, however, is founded upon an acknowledged maritime tort so that any contractual arrangements existing between vessel owner and

charterer should have no bearing upon the issue of the charterer's rights to recover actual out-of-pocket losses directly attributable to the Steelton's negligent navigation.

In the years since Robins was decided by this Court, there have been substantial changes in the conduct of maritime commerce on the Great Lakes and other navigable waters of the United States. Specifically, since opening of the St. Lawrence Seaway in 1959, ocean going vessels have been introduced into Great Lakes commerce in large numbers. For the most part these vessels are under a charter of one form or another, a fact which is common knowledge. Consequently, a tortious wrongdoer is charged with knowledge that its negligent conduct will result in damage to vessel charterers as well as owners.

While denying recovery of charter hire loss to a charterer in Federal Commerce & Nav. Co. v. The M/V Marathonian, supra, on the theory established by this Court in Robins, the Second Circuit challenged the validity of its own decision based simply on the fact that the party sustaining the loss was a charterer rather than a vessel owner reasoning, as previously noted, that this Court should retain the exclusive privilege of overruling its own decision.

In Venore Transp. Co. v. M/V Struma, supra, the Fourth Circuit adopted the very sensible rationale that a charterer required by the terms of the charter to continue payment of charter hire during the detention period was, in fact, the only party entitled to recovery since the owner, having re-

ceived full payment, had sustained no loss. The clear-cut distinction from Robins was that the charterer had not paid charter hire for the period during which the vessel was out of service. By adopting the most reasonable approach, that the mere fact the charter party has transferred the risk of loss of use from the owner to the charterer should not extinguish the right to recovery of a traditional item of damages, the Fourth Circuit allowed recovery to the charterer. Petitioners request this Court only to confirm the language of the Fourth Circuit that, when there has been no suspension in payment of charter hire during the period when the vessel is detained, the charterer who has paid the charter hire is entitled to recover what the owner would have been entitled to recover had those payments been suspended.

Such a conclusion is only a sensible and practical result and exposes the wrongdoer only to the requirement of responding to losses directly sustained by reason of its tortious conduct.

Furthermore, the reason and necessity for this Court's review of Robins at this time is exemplified by the inequitable situation presented by the diametrical results in Venore and the present case. In Venore, the company involved was a wholly owned subsidiary of Respondent herein and, in fact, the case was argued in the Fourth Circuit by Bethlehem's corporate counsel. Thus, in Venore, Bethlehem was in the position of asserting a charterer's right to recover and succeeded in doing so, whereas in these proceedings Bethlehem opposes such a right of

recovery. The contradiction so presented, by itself, should constitute a compelling inducement for this Court's review and clarification of Robins.

CONCLUSION

The Petition For Writ of Certiorari should be granted to re-examine and interpret the Norwalk Victory and Robins decisions in the general interest of the maritime community in conformity with this Court's recent pronouncements as to the scope and application of responsibilities in maritime torts. Specifically, it is essential to establish a uniform rule of law with respect to the right of vessels to recover detention damages in the absence of physical injury. The admiralty rule is that damages for detention are recoverable in collision cases. There is no viable

reason why they should not be equally recoverable in the absence of physical injury. Similarly, there should be no such distinction as between charterer and owner simply because of the existence of a charter.

For the foregoing reasons, Petitioners' Petition For Writ of Certiorari should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Service of the foregoing Petition For Writ of Certiorari and Appendix was made upon Respondent Bethlehem Steel Corporation, by delivering three (3) copies thereof to Lucian Y. Ray, Esq. and John H. Hanninen, Esq., Ray, Robinson, Hanninen and Carle, counsel of record, at their offices, 1050 Union Commerce Building, Cleveland, Ohio 44115, this 31st day of December, 1980; and that all parties required to be served thus have been served.

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